degree murder: to find petitioner guilty but to recommend life. That is exactly what his jury did.

This Court has held that failure to instruct on lesser-included offenses distorts the jury's factfinding and deliberative process in precisely the manner asserted by petitioner. In Keeble v. United States, 412 U.S. 205 (1973), the Court addressed the question of whether the Major Crimes of Act of 1885 should be construed to prohibit a jury instruction on a lesser included offense where the lesser included offense was not one of the crimes enumerated in the Act. This Court reversed the defendant's conviction for the greater offense holding that the defendant was entitled to an instruction on a lesser offense even though there was no jurisdiction to try him on the lesser offense. The value of such a safeguard was explained:

> ... if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other --precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

412 U.S. at 212-213 (Emphasis in original).

Applying the principles articulated in Keeble to a capital sentencing proceeding, this Court in Beck v. Alabama, 447 U.S. 625 (1980) held that the death sentence may not constitutionally be imposed where the jury was not permitted to consider a verdict of guilty of a lesser included offense. As in Keeble, the Beck opinion stressed that providing the jury with the less drastic option of conviction on a lesser included offense "ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard" Id. at 635. The Court made clear that when the evidence establishes that the defendant is guilty of "a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense --the failure to give the jury the 'third option' of conviction of a lesser included offense would seem inevitably to enhance the

tolerated in a case in which the defendant's life is at stake." Id. at 638.

In Holloway v. Florida, 449 U.S. 905 (1980) [a noncapital case], Justice Blackmun, dissenting from the denial of certiorari, observed that "the Court more than once has expressed the understanding that a lesser included offense option minimizes the risk of undermining the reasonable doubt standard." Id. at 908. He concluded that:

> The Court's decisions in both Keeble and Beck imply that affording jurors a less drastic alternative may be constitutionally necessary to enhance or preserve their essential fact-finding function. Whether the trial court properly may enter a judgment of guilt should the jury convict for a lesser included offense seems to me a separate, legal matter with which the factfinder need have no concern.

Id. at 909. Justice Blackmun reiterated these concerns in his dissent from denial of certiorari as to petitioner's conviction. Spaziano v. Florida, supra, 454 U.S. at ___, 102 S.Ct. at 283.

The evils identified in the cases discussed above were clearly present here and their invidious impact was not offset by the fact that the statute of limitations had run as to the lessers. Justice Marshall observed in his dissent from the denial of certiorari as to the conviction in this case:

> The principles underlying Keeble and Beck would seem to apply with just as much force where the statute of limitations on the lesser-included offenses has run. Those cases focused on the danger of an unwarranted conviction, where the jury was given only a choice between acquittal and conviction for the offense charged, and was not given the opportunity to consider whether the defendant was guilty of some lesser-included offense. This danger exists even where the statute of limitations has run with respect to the lesser offense. Thus, I think a strong argument can be made that the jury should be instructed as to that offense.
>
> A criminal defendant should not be penalized because the state did not bring him to trial within the time prescribed by the state legislature for lesser-included offenses. After receiving instructions on both the offense charged and the lesser-included offenses, the jury may render a guilty verdict on a lesser offense. Such a verdict would reflect the jury's conclusion that, although it believed beyond a reasonable doubt that the defendant was guilty of criminal conduct, it had a reasonable doubt as to whether the state had proved each element of the offense charged. At this point the court must decide as a matter

> [illegible] sentencing the petitioner for the lesser crime. The court should not be permitted to avoid this legal question by refusing to allow the jury to decide whether the defendant is guilty only of a lesser offense.

Spaziano v. Florida, supra, (Marshall, J., dissenting).[3]

The facts of this case, while unique in their extremity, place clear focus upon the constitutional question presented. Because the jury issued a verdict of life imprisonment rather than death, coupled with the general weakness of the evidence, this case presents a significant Eighth Amendment question. The context of this case places that question in a critical constitutional posture since it carries with it and embodies the inherent hazards identified explicitly by this Court in Beck v. Alabama, supra. The issues have been fully raised and decided in the courts below and are thus appropriate for this Court's plenary review at this time. The jury's verdict in this case was reasonable and thus serve as a stark witness to the evil-come-true of Beck. The death sentence thus is constitutionally improper and cannot stand.

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[3] Since the judgment of conviction of the petitioner by the trial court involves the adjudication of petitioner and the statute of limitation specifically governs this adjudication process, the consideration of the statute of limitations (except when factual issues are presented) is not for the jury and should have no effect upon the instructions which guide them in reaching its verdict. It is this very reason that a trial court does not instruct the jury that he may withhold adjudication following a determination of guilt by the jury.

The opportunity for prosecutorial abuse is painfully apparent. Given the recognition in both Keeble and Beck that, although in theory the jury must acquit where the state has failed to prove all the elements of the charged offense and there are no lessers, in fact the jury is likely to resolve any doubts in favor of conviction; an ill-motived prosecutor could in a case where the defendant may have actually committed homicide of a lesser degree wait until the statute of limitations had run and substantially increase the possibility that the defendant will be convicted of the higher charged offense. In fact it is interesting to note that the statute of limitations ran in this case only a month before the indictment was filed, an ironic fact that serves to highlight the unfairness to petitioner.

OF THE STANDARDS GOVERNING THE PROPRIETY OF A DEATH SENTENCE IMPOSED OVER A JURY VERDICT OF LIFE IMPRISONMENT SO AS TO VIOLATE THE FIFTH, SEVENTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Florida trial courts override jury life recommendations with some frequency. Because the issues raised in this petition have reoccurred in the past and will continue to reoccur in future cases,[4] this this Court should grant certiorari.

Even assuming that Beck v. Alabama, supra, were not held to apply to preclude the death sentence in this case as a matter of law, a further issue of constitutional dimension is presented. That issue concerns the appropriate constitutional standards that must govern a judicial decision to overrule a jury's life verdict in Florida. The question presented in this case is whether definition and application of the jury override should be left solely to state law or whether the override is limited by the United States Constitution. That question is especially crucial where, as here, the decision to override the jury implicates the serious dangers of unreliability identified in Beck. Petitioner will show that this Court's approval of Florida's override strongly suggests that certain procedural safeguards, adopted by the Florida Supreme Court but not followed in this case, are integral to the constitutionality of the override authority. In effect, this Court's approval of the override has been properly

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[4] See, e.g., Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied, ___U.S.___, 102 S.Ct. 1037 (1982); White v. State, 403 So.2d 331 (Fla. 1981); Zeigler v. State, 402 So.2d 365 (Fla. 1981), cert. denied ___ U.S. ___, 102 S.Ct. 1739 (1982); Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert. denied, ___U.S.___, 102 S.Ct. 364 (1981); Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied, 447 U.S. 912 (1980); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 (1978);Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978); Douglas v. State, 328 So.2d 18 (Fla.), cert. denied, 429 U.S. 871 (1976); Goodwin v. State, 405 So.2d 170 (Fla. 1981); Odom v. State, 403 Fla. 1d 936 (Fla. 1981), cert. denied, ___U.S.___, 102 S.Ct. 1970 (1982); McKennon v. State, 403 So.2d 389 (Fla. 1981); Smith v. State, 403 Fla. 2d 933 (Fla. 1981); Stokes v. State, 403 So.2d 377 (Fla. 1981); Welty v. State, 402 So.2d 1159 (Fla. 1981); Barfield v. State, 402 So.2d 377 (Fla. 1981); Phippen v. State, 389 So.2d 991 (Fla. 1980); Williams v. State, 386 So.2d 538 (Fla. 1980); Neary v. State, 384 So.2d 881 (Fla. 1980); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979); Shue v. State, 366 So.2d 387 (Fla. 1978); Buckrem v. State, 355 So.2d 111 (Fla. 1978); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Burch v. State, 343 So.2d 831 (Fla. 1977); Chambers v. State, 339 So.2d 204 (1976); Provence v. State, 337 So.2d 783 (Fla.), cert. denied, 431 U.s. 969 (1976); Jones v. State, 332 So.2d 615 (Fla. 1976); Thompson v. State, 328 So.2d 1 (Fla. 1976); Tedder v. State, 322 So.2d 908 (Fla. 1975); Swan v. State, 322 So.2d 485 (Fla. 1975).

principle that would bring the override within the ambit of constitutional acceptability. Although such a limiting principle is in part a matter of "state law", failure to follow that principle in this case resulted in deprivation of fundamental rights guaranteed of the federal Constitution.

A. This Case Presents a Significant Federal Question

This Court has suggested that Florida's jury override is constitutional on its face. See Barclay v. Florida, ___U.S.___, ___, ___, 103 S.Ct. 3418, 3425, 3427, 3428 (1983); id. at ___, 103 S.Ct at 3426-3427 (Stevens, J., concurring); Dobbert v. Florida, 432 U.S. 282, 295 (1977); Proffitt v. Florida, 428 U.S. 242 (1976). This Court's initial approval of the override was not, however, unqualified; it was contingent upon Florida's adherence to certain procedures governing administration of the override.

In evaluating this Court's facial acceptance of the override it is necessary to identify precisely what it is that makes Florida's procedure constitutional. In every case where this Court has had occasion to pass on the override, its approval has been based, in large measure, upon the procedural protections with which Florida has clothed its system. This Court in Proffitt v. Florida and Barclay v. Florida quoted with approval the principle adopted by the Florida Supreme Court in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975): "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." See Proffitt v. Florida, 428 U.S. at 250; Barclay v. Florida, ___ U.S. at ___, 103 S.Ct. at 3425, 3427. More significantly, in Dobbert v. Florida, this Court described the "exacting standards of Tedder" as being a "crucial protection" that is "most important" to the capital punishment statute of Florida. 432 U.S. at 296.

violation of Tedder in this case directly implicates rights protected by the United States Constitution. Decisions by this Court approving the jury override strongly suggest that without Tedder the override would create serious constitutional difficulties. Implicit in this Court's decision that a particular state procedure will satisfy constitutional requirements is the crucial assumption that the state will follow that procedure. In capital cases, it is precisely the clearly defined existence of and adherence to the state procedural rules that qualifies a sentencing decision as nonarbitrary and thus constitutionally permisssible.

This Court validated a specific procedural scheme when it approved the override in Proffitt. Because the limitations imposed by Tedder make the override constitutional, ignoring these limitations implicates the Constitution. Failure to abide by Tedder would result in the arbitrary imposition of the death penalty in violation of the Eighth amendment. Having stated in Tedder that it will reject only those jury life recommendations that are utterly unreasonable, Florida must adhere to that standard.

The constitutional analysis urged by petitioner is strikingly similar to that employed by this Court in Godfrey v. Georgia, 446 U.S. 420 (1980). The issue in Godfrey was whether the aggravating circumstance delineated in Georgia Code. Ann. §17-10-30(b)(7), upon which Godfrey's death sentence was based, was applied in an unconstitutionally vague, overbroad and ambiguous manner. The Godfrey Court noted that it previously had said that subsection (b)(7) was vague on its face but there was "no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction" of the statutory provision. Gregg v. Georgia, 428 U.S. 113, 201 (1976). In Godfrey, this Court concluded that the Georgia Supreme Court had in fact placed a narrowing gloss on the statute and that such a reading made the aggravating circumstance constitutionally acceptable. 446 U.S. at 431. But because in Godfrey's case the Georgia Supreme Court failed to apply its limiting construction of the (b)(7) aggra-

Court has thus recognized that in evaluating state procedures designed to meet the mandates of the Eighth Amendment, the line between "federal law" and "state law" is at times difficult to discern.

Similarly, if Florida's override is constitutional, it is so only by virtue of Tedder. In the present case, however, Tedder was not followed. The lower courts failed to follow the Tedder standard in overriding and in approval of that override by omission of any consideration of the reasonableness of the jury's life verdict. Neither the state trial judge who overrode the jury nor the Florida Supreme Court that affirmed the sentence found that "virtually no reasonable person could differ" over the necessity of the death penalty in this case. Instead the courts simply found that there were facts that supported the impositon of death. By ignoring the reasonable bases for the jury's verdict, the Florida Supreme Court has inconsistently applied its jury override standards, resulting in such a vague and overbroad construction so as to to violate settled constitutional precepts. The jury's life verdict in this case was reasonable, and hence the imposition of death, over that reasonable jury verdict, violated the Eighth Amendment. As petitioner demonstrates below, reasonable persons could and did differ over whether Joseph Spaziano should live or die.

B. The Jury's Sentencing Verdict of Life Imprisonment Was Reasonable

The jury's verdict was eminently reasonable under the unique circumstances of this case where (1) the jury was not given the "third option" of considering lesser included offenses; and (2) the evidence of guilt was inconclusive as to the degree of homicide that had occurred and was weak even as to whether

are set out below in some detail in order to show their viability in this case.

1. The Lack of Instructions on Lesser-Included Offenses

As discussed in Point I, supra, the jury in this case was not given the opportunity to consider any lesser offenses to first degree murder because it was determined that the statute of limitations had run as to those lesser offenses. This posed a dilemma for a jury faced with an offense portrayed as brutal, but supported only by inconclusive evidence, with guilty of first degree murder or not guilty as its only options. The hazards of such a dilemma in capital cases forecasted by this Court in Beck were realized in this case. That the lack of the "third option" affected the jury's decision-making process is evidenced clearly by the circumstances of the jury's deliberations.

The jury in petitioner's case had great difficulty in reaching a verdict on guilt -- obviously because of the very weak proof of first degree murder that had been offered. The jury deliberated a total of five hours over a span of time beginning late in the afternoon and continuing until 11:00 p.m. The chronology of the deliberations is instructive:

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6 Though petitioner focuses in this discussion upon the lack of instructions and the weakness of the evidence, there is further support for the reasonableness of the jury's verdict from the existence of substantial mitigating evidence. Some of this evidence was summarized by the dissenting opinion below, 433 So.2d at 512. Also, in the judge's first sentencing order, prior to the remand, the judge had found the statutory mitigating circumstance of petitioner's age. In the judge's current sentencing order the judge did not delineate the mitigating factors he considered, but rather simply stated that "the mitigating circumstances are insufficient to outweigh such aggravating circumstances..." (R 201). As the Florida Supreme Court has recognized: "In order to have weighed the aggravating circumstances against the mitigating circumstances, the court must have found some of the latter." Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977)((emphasis in original). Accordingly, the jury's verdict is reasonable for the additional reason that it was supported by mitigating factors present in the case.

810	Jurors brought back to inquire about dinner	6:28 P.M.
811-812	Jurors decide to continue deliberating	6:30 P.M.
813	Court receives word jury is having trouble reaching a unanimous verdict. Court sends jury to dinner.	8:29 P.M.
815	Jury returns from dinner Court inquires of foreman whether "if given more time there is a reasonable probability that the jury could agree upon a verdict, it being the jury's function to do so."	9:57 P.M.
815-816	Jury requests additional time and continues to deliberate	9:59 P.M.
817	Jury brought back. Court inquires of foreman whether or not jury would be able to reach a verdict. Foreman replies, "At this point, Your Honor, I don't believe so."	10:56 P.M.
817-819	Court gives jury deadlock charge over objection. Court recesses for not longer than half an hour	
818	Jury retires and continues their deliberations	10:29 P.M.
819-820	Court orders jury returned. Court receives word that jury wants five more minutes	11:03 P.M.
820	Jury returns with verdict	11:07 P.M.

By contrast, the jurors deliberated only a short time before returning their life recommendation. Unlike guilt/innocence, the jurors had no difficulty in reaching agreement on the appropriate sentence. The jury apparently felt that although the evidence may have been sufficient to convict, it was insufficient to warrant imposition of the most extreme penalty. This circumstance is Beck brought to reality.

however, lies in the weakness of the evidence. Because the weakness of evidence of first degree murder explains the reasonableness of the jury's verdict, that evidence must be discussed in some detail.

2. Weakness of Evidence of First Degree Murder.

In the present case, the evidence as to degree of the offense is virtually absent; the evidence is extremely weak even as to whether petitioner was involved in the death at all. The State relied primarily on the testimony of Tony Dilisio to obtain the conviction. Aside from Dilisio the evidence consisted of testimony of two of the deceased's friends and testimony of two individuals who had known petitioner. The evidence was entirely circumstantial regarding petitioner's involvement in the alleged offense. Not only was there no direct evidence linking petitioner to the alleged crime, there was also no direct evidence that a crime necessarily had been committed.

The State attempted to prove through the testimony of Beverly Fink and Jack Mallen, the deceased's roommate and the roommate's boyfriend, that petitioner knew the deceased prior to her death. Both witnesses testified that an individual they identified as petitioner came to the door of the apartment sometime in July and asked to see the decedent (T 401-402, 467-468). However, they identified that individual, who said he was a traveling cook, to be petitioner from a suggestive photographic lineup. See States Exhibit 7. Ms. Fink also testified that the deceased was dating several individuals, one of whom was named "Joe", but none of whom was petitioner (T 408-409, 410-411, 437). In addition, William Coppick and Mike Ellis testified that approximately two years prior to the alleged incident, petitioner lived in a trailer in the same general area where the deceased's body was found. Mr. Coppick also testified that petitioner told him about finding some bones, but never said where or exactly when the alleged conversation took place (T 563, 572). Mr. Ellis further stated that petitioner took him to the general area where

get some marijuana "stashed" there (T 599-600, 602-603). Again, Mr. Ellis was unsure of the date when this took place. Other than this testimony, the State relied on the testimony of the 16-year-old Dilisio.

Dilisio did not testify that he was present or that he otherwise had personal knowledge of the offense itself. Rather, he only related what petitioner purportedly told him about the crime and he supposedly saw of the scene weeks later. Dilisio said that petitioner took him to an area where Dilisio observed two bodies (T 631). Prior to this, Dilisio claimed petitioner had told him about various things he had done to "some girls" (T 626-627). Dilisio testified he never believed petitioner and that he thought petitioner was bragging to impress him (T 627-628). Dilisio further indicated that he idolized petitioner and wanted to ride motorcycles with him (T 639, 689-690). Finally, Dilisio stated he did not report what he had seen because he wanted to be an Outlaw (T 689).

The testimony of Tony Dilisio was unworthy of belief for several reasons. First, Dilisio had a motive to lie. Dilisio testified in his deposition that he believed that petitioner had "raped" his stepmother (R 49-50). It was precisely because of that supposed incident that Dilisio broke off his relationship with petitioner. Secondly, according to his father, Dilisio had a tendency to exaggerate the truth, although not to the point of being an "extreme" pathological liar (R 182). Dilisio's belief in petitioner's involvement with his stepmother alone provided Dilisio with enough incentive to strike out against the very individual he sought to emulate.

Thirdly, Dilisio was an admitted drug user before, during and after the alleged incident at the dump. Dilisio admitted to using L.S.D., smoking marijuana, ingesting cocaine and taking all sorts of drugs, except heroin (T 655-656). Dilisio also admitted that while on L.S.D. he sometimes hallucinated, fantasized, saw things that did not exist, saw distortions and forgot things that

stated he combined marijuana and L.S.D. often, which resulted in an accelerated hallucinogenic experience (T 661-662).

Perhaps the single most important factor detracting from Dilisio's credibility was the fact that he never testified about the alleged incident at the dump until after he went to a hypnotist (R 80). Dilisio indicated in his deposition that he was questioned by the police several times without mentioning the alleged incident. It was only after hypnotism that his memory "returned." Dilisio stated he could not remember whether the hypnotist used mind-relaxing drugs, nor, perhaps more importantly, could he recall whether the hypnotist or the police suggested anything to him while under hypnosis (R 82-85). It also must be considered that when Dilisio was first approached by the police and at the time of several of the initial interviews, Dilisio was in detention and at a halfway house (R 74-79). Yet, subsequent to the hypnotic session and his revelations, when his deposition was taken Dilisio testified he was on probation (R 47). Further, Dilisio gave several inconsistent statements regarding the location of the bodies he allegedly saw and the route taken to arrive there. His testimony differed on direct and cross examination from the description he gave at the deposition.

The cumulative effect of the foregoing circumstances is that the testimony given by Dilisio is replete with inconsistencies, is unsatisfactory and insubstantial, and thus totally unworthy of belief. That without Dilisio the State would not have been able to prove petitioner's involvement at all was admitted by the prosecutor during argument on petitioner's motion to exclude the testimony of Dilisio's father (T 614).

If Dilisio's testimony had been rejected in whole or in part, as being unworthy of belief then clearly the State did not meet its burden of proving that petitioner committed premeditated murder. Even if Dilisio's testimony were believable, the evidence was still circumstantial and insufficient. Several reasonable hypotheses of innocence are apparent from the record. First, as both Dilisio and his father indicated, petitioner could

mere fact [if a fact at all] that petitioner took Dilisio to view a body does not mean that petitioner killed the person or knew who did. There is absolutely no corroboration of Dilisio's testimony as to who killed the deceased, or even how she died.

Secondly, there is a reasonable hypothesis apparent in the record that someone else killed the deceased. Both Ms. Fink and Mr. Mallen testified the deceased was afraid of a couple she met immediately before her disappearance. Both indicated that the deceased told them that the couple talked about "group sex". And, specifically, Ms. Fink stated that the deceased had become frightened when the couple began driving off back roads and talking about sex (T 429). Thus ,again, the evidence does not conclusively point only to petitioner. Rather, it is evident that others had an opportunity and, apparently, a motive. Clearly the State did not establish a motive on petitioner's part.

Thirdly, there is the reasonable hypothesis that Dilisio lied or imagined the bodies while hallucinating. In the present case, Dilisio's father indicated that although he would not say his son was an "extreme pathological liar", he did say Dilisio exaggerated the truth (R 182). And Dilisio had a motive to lie as petitioner, according to Dilisio, had raped his stepmother

. Fourthly, there exists a reasonable hypothesis of innocence that Dilisio's sudden return of memory after a session with a hypnotist was a product of suggestion by either the hypnotist or the police in conjunction with mind-relaxing drugs normally used in hypnosis.

Finally, even had the jury believed that petitioner were somehow involved, the jury could have believed the evidence to be insufficient to prove premeditation beyond a reasonable doubt.

Thus the weakness of the State's evidence, combined with the jury's difficulty in reaching a guilty verdict and its ease in reaching a life recommendation, strongly suggest that it did in fact believe that petitioner was guilty of an offense less than first degree murder. But the judge's instruction prevented the jury from acting on that belief. The jury's only safeguard against the overall weakness of the evidence was its advisory

involving a lesser mental element, would be perfectly justified.

instruct on the lesser degrees of homicide, it cannot be concluded that the jury's life verdict was unreasonable. In fact, the constraints placed upon the jury by the trial judge rendered "guilty, but life" the most reasonable verdict the jury could have given on the basis of the evidence. The trial judge's override of that reasonable recommendation was an error of constitutional magnitude.

3. Overriding the Jury's Reasonable Verdict of Life, cannot be justified by Reliance upon Aggravating Circumstances Based on Evidence Not Before the Jury.

The sentencing judge's decision to override the jury's recommendation may have been grounded upon his consideration of evidence not presented to the jury. Such a basis for overruling a reasonable jury verdict would, however, be improper. While the judge could properly use evidence not before the jury to rebut a mitigating circumstance asserted by a defendant, see Barclay v. Florida, ___ U.S.___, 103 S.Ct. at 3426-3427 (Stevens, J., concurring), it was improper to use such evidence as the sole basis of an aggravating circumstance not found by the jury.

The trial court found, as an aggravating circumstance, that petitioner had previously been convicted of felonies involving the use or threat of violence. Fla. Stat. §921.141(5)(b). The finding was based on evidence, offered by the state, that petitioner had committed another offense in August, 1975. The court ruled the prior conviction inadmissible at the penalty phase; thus, it can fairly be said that the court's decision to overrule the jury's reasonable life recommendation was based upon evidence not presented to the jury.

Florida's system of jury override mandates that all evidence forming the sole basis of an aggravating circumstance be presented to the triers of fact during the advisory sentencing proceeding. For the scheme approved in Proffitt and Dobbert to function fairly, judge and jury must rely on the same evidence in aggravation in performing their weighing functions. State v. Dixon, 283 So.2d 1, 8 (Fla. 1983). When a judge relies on evidence in aggravation which was not considered by the trial

jury and uses it to override the jury's reasonable finding of life, the statutory guidelines designed to eliminate the arbitrariness identified in Furman v. Georgia, 408 U.S. 238 (1972) cannot operate as intended.

Further, the potential for prosecutorial abuse of the procedure used in this case is impressive. Allowing a judge to consider in aggravation materials not before the jury would encourage prosecutors to "sandbag" defendants by holding back certain evidence in case the jury returned an advisory verdict of life with the hope of persuading the judge to overrule the jury. Such tactics by defense lawyers have, in recent years, increasingly drawn this Court's ire.

The Florida Supreme Court appears to acknowledge that the jury must be given access to all evidence forming the basis of aggravating circumstances. The Florida Supreme Court, in Richardson v. State, ___ So.2d ___, ___ [slip opinon 8 Fla. L. W. 327, 328] (September 9, 1983), recently held that it "cannot condone a proceeding which, even subtly, detracts from comprehensive consideration" by the jury of evidence relevant to aggravation and mitigation. The trial judge had overridden the jury's life recommendation because the jury "did not have the benefit of all of the evidence." Id. The state Supreme Court reversed the trial judge's override, stating that it could not "countenance the derrogation of the jury's role implicit in (the trial court's rejection of the life recommendation." Id. In Messer v. State, 330 So.2d 137 (Fla. 1976), the trial judge excluded from the jury sentencing proceeding evidence tending to show that the defendant was suffering from a mental or emotional disturbance at the time of the offense. The Florida Supreme Court, in invalidating the death sentence, rejected the trial judge's reasoning that he could himself consider the psychiatric reports before actually imposing sentence. The Florida Supreme Court reached a similar result in Miller v. State, 332 So.2d 65 (Fla. 1976). The defendant in Miller sought a continuance before the sentencing hearing to secure the attendance of psychiatrists. The trial judge denied the continuance on the ground that he

could consider the opinions of the mental health experts after the jury rendered its advisory opinion. The Florida Supreme Court invalidated the death sentence.

Because of the "great weight" to be given a jury's recommendation of life, the Florida Supreme Court in Tedder held that "(i)n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." 322 So.2d at 910. From this it must follow that the judge , in overruling a jury's reasonable recommendation of life, cannot base an aggravating circumstance solely upon evidence not before the jury.

C. Conclusion: The Jury, Not the Judge, Acted Reasonably and Constitutionally

By failing to instruct the jury on the lesser degree offenses, the jury was placed in a position identical to that of the juries in Beck and Keeble. There was substantial doubt raised by the State's case as to the guilt of petitioner for the crime charged. Yet, the jury was understandably unwilling to risk the chance that petitioner might in fact be guilty. The verdict unequivocably establishes that this dilemma in the juror's minds was resolved in favor of guilt as opposed to acquittal as this Court predicted in Beck that it would. Had the jury been allowed to consider verdicts of lesser degrees, then its essential fact-finding function would have been preserved. Instead petitioner's jury was left with only one safeguard against an erroneous decision -- it very quickly recommended life as the appropriate punishment.

Petitioner's jury acted reasonably in recommending life over death. Confronted with two equally implausible yet exclusive options, and with an extremely weak case of guilt, the jury did the only reasonable thing it could do: it found petitioner guilty but recommended life imprisonment.

It is perhaps significant that neither the Florida Supreme Court nor the state trial court, in approving petitioner's death sentence, made the finding required by Tedder that "virtually no

reasonable person could differ" over the necessity of a death sentence. The Florida Supreme Court held that "the facts suggesting the death sentence be imposed... meets the clear and convincing test to allow override of the jury's recommendation." (emphasis added). This test is quite different from Tedder and suggests that the Florida courts were aware that Tedder was not met in this case. Reasonable people could and did differ over the fate of Joseph Robert Spaziano.

III. A TRIAL JUDGE'S OVERRIDING A JURY'S FACTUALLY BASED DECISION AGAINST THE DEATH PENALTY MUST, IN ALL CASES, VIOLATE THE FIFTH, SEVENTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner argued above that the jury override was unconstitutionally applied in this case. But the difficulties in defining and administering the override, brought sharply into focus by petitioner's case, lead inevitably to a broader inquiry: is the override itself constitutional? Petitioner readily acknowledges that this Court has suggested that the override is constitutional. At least one lower court has read Proffitt, Dobbert and Barclay as foreclosing the matter. See Douglas v. Wainwright, ___F.2d ___ (11th Cir. 1983). It is for that reason that only this Court can revisit the issue.

Petitioner respectfully asks this Court to reconsider the issue. Florida's jury override should be declared unconstitutional on its face for at least four reasons: the nature of the death decision, based as it is on retributive impulses, can only be imposed by a cross-section of the community whose outrage is being expressed; for this reason, judges have no special expertise and in fact juries are the true "experts" on whether death is appropriate in any given case; the practice of overturning a jury's penalty determination is contrary to the overwhelming national practice since at least 1948, it is also contrary to the great weight of professional legal opinion.

Because Florida has chosen to involve a jury in deciding who dies, the life verdict of that jury should stand.

A. The Nature of the Decision on Death

Death is different, this Court has stated, for several reasons. Not only is this penalty irremediable, but the motive for its imposition differ from any other penalty permissible under our Constitution. Rehabilitation is irrelevant and incapacitation , while conceptually applicable, has never been emphasized as a goal of the death penalty. Deterence is a matter of great importance to legislatures debating whether the death penalty is appropriate at all, but not to particular juries deliberating whether the penalty should be imposed in a given case. Retribution, petitioner would assert, is the primary goal of execution. This Court has recognized again and again that the death penalty represents a statement our society makes about the kind of people we are. An execution is a public testament of revulsion . See Furman v. Georgia, 408 U.S. at 453 (Powell, J., dissenting); Gregg v. Georgia, 428 U.S. at 184.

Because the death decision is a retributive one and because retribution is an expression of the will of the "community", a greater degree of reliability is achieved if the will of that body is expressed and followed. The kind of reliability discussed by this Court in cases such as Lockett v. Ohio, 438 U.S. 586, 604, 605 (1978) refers to the accuracy of the decision to be retributive. A jury is substantially better able to convey the community's wish for retribution than is a single judge. The role of the jury in capital sentencing is to "maintain a link between contemporary community values and the penal system" that reflects the "evolving standards of decency that mark the progress of a naturing society". Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968). The Court's reference to this "link" is another way of saying that the jury's job is to speak the community's desire for retribution. And that is a job that only a jury can perform.

B. The Myth of Judicial Expertise in Capital Sentencing

One may accept the general proposition that jury sentencing is required to ascertain the "conscience of the community" and still argue that judicial sentencing is needed to foster con-

sistency among cases. This Court in Proffitt v. Florida observed that "judicial sentencing should lead to greater consistency ... since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." 428 U.S. at 252. Petitioner respectfully submits that this proposition is an inaccurate statement of the nature of the capital sentencing decision.

There is no way for a judge to equal what a jury can best bring to the capital sentencing process -- the community's view. Juries, properly chosen in accordance with law designed to assure that they reflect a fair cross-section of the community, are more likely to accurately reflect community values than are individual trial judges. This is true because twelve people are more likely than one person to reflect public sentiment, because jurors are selected in a manner enhancing that likelihood and because judges collectively do not represent --by race, sex or economic or social status --the communities from which they come. This is the touchstone of the retributive impulse, and in this it is the jury, not the judge, which has the "expertise."

Further, this Court's concern with "individualization", expressed in Lockett renders questionable the theoretical relevance of "analogous" cases at the jury sentencing stage. Lockett emphasises the differences between people, their "uniqueness", 438 U.S. at 605, when it comes to capital sentencing.

Finally, consistency among cases need not occur at the judge-jury stage of the process. Consistency can and must be provided though the appellate review procedures approved by this Court in Proffitt. To the extent that different trial judges sentence similar defendants, they will predictably apply different standards in capital cases, just as they do now in noncapital cases.

C. National Practice

In testing the constitutional validity of death penalty procedures, this Court has often looked to the national legislative practice. See, e.g. Roberts v. Louisianna, 428 U.S. 325, 336 (1976); Coker v. Georgia, 433 U.S. 584, 593-597 (1987); Beck

v. Alabama, 447 U.S. 625, 635-637 (1980). Such examination in this case reveals that the practice of overturning a jury's penalty determination is contrary to the overwhelming national practice since at least 1948, thus violating the "evolving standards of decency" identified by this Court in Gregg v. Georgia and Gardner v. Florida, 430 U.S. 349 (1977). Such overwhelming national rejection of a procedure for imposing the ultimate penalty must at the very least raise serious doubts about its constitutionality.

In 1948, only New York, Delaware and Utah sanctioned the practice of jury override, out of 42 jurisdictions (including federal) with discretionary capital punishment for murder.[7] By the time of Furman in 1972 only Delaware and Utah permitted such a procedure out of 41 capital murder jurisdictions (including federal and District of Columbia)[8], New York having made a mercy decision by either the judge or the jury binding in 1963.[9]

Since the decision in Furman, of 32 jurisdictions (including federal) which have adopted "guided discretion" death penalty statutes with jury participation in the penalty phase, only Florida, Indiana and Alabama permit death sentences after jury decisions for life (see Appendix D). Moreover, only in Florida does it appear that such death sentences have actually been imposed and affirmed since Furman. As of May, 1981, no death sentences after jury life determinations had been imposed under the Indiana or Alabama statutes.

An additional indicator of unconstitutionalilty is the great rarity with which death sentences after jury mercy recommendations were actually imposed and executed under the pre-Furman Utah and New York laws. There were no executions in Delaware after 1949). All seven Utah executions during the period of

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7 See Andres v. United States, 333 U.S. 740, 767 (1948) (Frankfurter, J., concurring). Inadvertently, Justice Frankfurther listed New York as binding and New Mexico as nonbinding, but see New Mexico Acts of 19), Ch. 49 (jury recommendation of life imprisonment in caital case binding).

8 See Witherspoon v. Illinois, 391 U.S. 510, 525-527 and nn. 2-8 (1968) (Douglas, J., concurring). Both Utah and Delaware now make life imprisonment automatic unless the jury unanimously agrees on death. (See Appendix D).

9 See People v. Fitzpatrick, 308 N.Y.S.2d 18, 22 (1970).

1948-1972 involved cases where the jury had refused to recommend life imprisonment; in two other cases death sentences were affirmed by the Utah Supreme Court after jury life recommendations, but the defendants received executive clemency (see Appendix E for Utah cases). Commentators have also observed that under the pre-1963 New York law, trial judges almost "invaribly" followed jury recommendations of mercy. See Togman, The Two-Trial System in Capital Cases, 39 N.Y.U.L. Rev. 50, 75 n. 171 (1964), citing New York District Attorney's Association, Memorandum and Draft Bill (October 17, 1960).

Thus, at least since 1948, death sentences after jury decisions for life have been rare in legislative practice and yet rarer in application. This indiction of unconstitutionality must be given great weight.

D. Professional Legal Opinion

This near-uniform consensus of the States that jury decisions against the death penalty should be final is in accord with professional legal opinion, another factor to be considered in due process questions concerning jury and death penalty practices.[10]

While this Court in Proffitt, 428 U.S. at 252 n. 10, cited sources to show that trial judges can play a useful role in capital sentencing, it did not appear to attempt to ascertain professional opinion on the imposition of a death sentence after a jury decision of life. Surveying the literature both before and after Furman, petitioner finds considerable agreement that jury participation is undesirable in noncapital sentencing but highly desirable if not constitutionally mandated in deciding life or death; that if a jury takes part in the penalty phase of a capital case, its verdict for life must be final; but a jury's decision for death may best be treated as a mere recommendation to the court.

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[10] See e.g. Gregg v. Georgia, supra, 428 U.S. at 189-195.

A major study endorsed by this Court in Duncan v. Louisiana, 391 U.S. 145 (1968), found a reasonable basis for judge/jury disagreements in capital penalty decisions.[11] This pattern holds true in Florida. See Appendix F. Further, even severe critics of noncapital jury sentencing have advocated the jury's power to reject the death penalty.[12]

Special attention is called to the two sources directly cited by this Court in Proffitt, 428 U.S. 252 n., 109, which note with approval the prevailing practice of requiring a jury 's consent for the death sentence but leaving noncapital sentencing to experienced judges alone.[13]

Since the 1976 death penalty decisions, some commentators have concluded that jury participation and consent in a death sentence (unless waived) is constitutionally required,[14] although it is not necessary to reach this broader issue in order to prohibit overturning a jury's life determination. Several sources, including the Model Penal Code, endorse a system where the trial judge is the final sentencer (as in Florida), but an

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11 H. Kalven and H. Zeisel, The American Jury 445 (1966), cited in Duncan 391 U.S. at 157 and nn. 24 & 26.

12 See, e.g., Note, Jury Sentencing in Virginia, 53 Va. L. Rev. 968, 969 (1967); Rubin, The Law of Criminal Correction 375 (1973). LaFont, Assessment of Punishment--A Judge or Jury Function, 38 Texas L. Rev. 834, 838 (1960); Report of the Royal Commission on Capital Punishment, 1949-1953, ¶571.

13 See American Bar Association Project on Standards for Criminal Sentencing, Sentencing Alternatives and Procedures, §1.1, Commentary (Approved Draft 1968) 47-48 (reasons for giving requiring jury consent for death penalty); President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society Task Force report, The Courts 26 (capital jury discretion generally accepted, but noncapital jury sentncing undesirable).

14 See Liebman and Shepard, Guiding Capital Sentencing Discretion Beyond the "Boiler Plate:" Mental Disorder as a Mitigating Factor, 66 Geo.L.J. 757, 819 n. 273 (1978) jury is appropriate, if not constitutionally mandated, capital sentencing forum); Mannheim, The Capital Punishment Cases: A Criticism of Judicial Method, 12 Loy.L. Rev. 85, 107-108, 131 (1978) (suggests requirement of jury consent for death in penalty phase under the Constitution); Gillers, Deciding Who Dies, 129 U. Penn. L. Rev. 1, 39-74 (1980) (jury consent for death constitutionaly required).

advisory jury's decision against death is final.[15] One commentator comparing several post-Furman systems generally endorses Florida's statute and case law, but disapproves of the tension created between judge and jury when a jury's decision for life can be overruled.[16]

E. Conclusion

This Court should grant certiorari to reconsider whether a state legislature may involve a jury in a capital punishment trial similar to a trial on guilt or innocence and then treat a finding in favor of the accused as merely advisory. Because the capital decision hinges upon retribution, only a jury can decide who dies. For this reason, virtually every State in the Nation makes jury verdicts for life binding. Florida's system of jury override is unconstitutional.

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15 American Law Institute, Model Penal Code 210.6 and Commentary at 133 (Prop. Off. Draft 1962); Togman, supra, 39 N.Y.U.L. Rev. 50, 53; Wollan, The Death Penalty After Furman, 1974 Crim. Justice Systems Rev. 213, 230; Symposium on Capital Punishment, 7 N.Y.L. Forum 249, 312-313 (1961) (opinion of Prof. Louis B. Schwartz); Comment, Jury Discretion and the Unitary Trial Procedure in Capital Cases, 26 Ark. L. Rev. 33, 52-53 (1972).

16 Shapiro, First Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Impositoin of the Death Penalty in Georgia, Florida, Texas and Louisiana, 24 Loy. L. Rev. 709, 736, 743-747 (1978).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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BY _____
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APPENDIX A

Joseph Robert SPAZIANO, Appellant,

v.

STATE of Florida, Appellee.

No. 50250.

Supreme Court of Florida.

May 26, 1983.

Rehearing Denied July 13, 1983.

Defendant was convicted of first-degree murder in the Circuit Court, Seminole

County, Robert B. McGregor, J., and the jury recommended life imprisonment. The trial judge overrode the jury verdict to impose the death sentence, and defendant appealed. The Supreme Court, 393 So.2d 1119, affirmed defendant's conviction but remanded for resentencing. The trial court reimposed the death sentence following the resentencing hearing, and defendant appealed. The Supreme Court held that: (1) consideration at resentencing hearing of prior violent felony as aggravating factor did not improperly expand scope of remand or subject defendant to double jeopardy by introduction of new evidence to prove additional aggravating factors; (2) consideration of defendant's previous convictions for felonies involving violence as aggravating factor at resentencing proceeding was proper, though such convictions were not presented to jury for consideration in original sentencing proceeding; (3) trial judge's imposition of death sentence following jury recommendation of life imprisonment did not violate double jeopardy protections of Fifth Amendment; (4) due process did not require that resentencing proceedings be assigned to new judge.

Affirmed.

McDonald, J., dissented and filed opinion.

1. Criminal Law ⇐163, 1192

Consideration at resentencing hearing of prior violent felony as aggravating factor did not improperly expand scope of remand or subject defendant to double jeopardy by introduction of new evidence to prove additional aggravating factor, where information concerning conviction, which was then on appeal, was contained in original presentence investigation report so that evidence of conviction clearly had been submitted in initial proceeding. U.S.C.A. Const.Amend. 5.

2. Criminal Law ⇐1192

In resentencing proceeding after remand, trial judge may properly apply the law and is not bound by prior legal error.

3. Criminal Law ⇐1208(1)

Trial court, in imposing death sentence, did not err in considering defendant's previous convictions for felonies involving violence, though such convictions were not presented to jury for consideration in original sentencing proceeding. West's F.S.A. § 921.141; U.S.C.A. Const.Amends. 8, 14.

4. Homicide ⇐354

Defendant's torture of victim with knife while she was still living was properly considered by trial judge as aggravating factor in overriding jury recommendation of life sentence, and met clear and convincing test to allow override of jury's recommendation.

5. Criminal Law ⇐163

Trial judge's imposition of death sentence following jury recommendation of life imprisonment did not violate double jeopardy protection of Fifth Amendment where death penalty procedure was not based on a controlling jury recommendation concerning sentencing, and case was not one in which appellants had been granted a new trial and had been resentenced by new jury. U.S.C.A. Const.Amend. 5.

6. Constitutional Law ⇐270(1)

Where defendant offered no evidence of bias or prejudice on part of sentencing judge other than fact he was trial judge in case, and evidence showed that sentencing judge properly disregarded improper information in original presentence investigation report in resentencing defendant, defendant was not denied due process because resentencing proceedings were not assigned to new judge. U.S.C.A. Const.Amend. 14.

Richard L. Jorandby, Public Defender, Craig S. Barnard, Chief Asst. Public Defender and Jerry L. Schwartz, Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, for appellant.

Jim Smith, Atty. Gen., and Wallace E. Allbritton, Tallahassee, Richard W. Prospect and Sean Daly, Asst. Attys. Gen., Daytona Beach, for appellee.

PER CURIAM.

This is an appeal from a death sentence which was reimposed upon appellant following a resentencing hearing ordered by this Court in *Spaziano v. State*, 393 So.2d 1119 (Fla.), *cert. denied*, 454 U.S. 1037, 102 S.Ct. 581, 70 L.Ed.2d 484 (1981). We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. We affirm.

Appellant was convicted in 1976 of the first-degree murder of Laura Harberts. The testimony at appellant's trial revealed that appellant "often bragged about the girls he had mutilated and killed," and that on one occasion he had taken two individuals to a dump site to show them two corpses to substantiate his claim of responsibility for the murders. One of the individuals accompanying appellant to the dump site later directed police officers to the bodies, one of which was identified through the use of dental records as being that of Miss Harberts.

The jury recommended that appellant be sentenced to life imprisonment. The trial judge, at the initial sentencing proceeding, ordered and considered a presentence investigation report. He imposed the death sentence, finding two aggravating circumstances: (1) that the offense was committed in a manner which was heinous, atrocious, and cruel; and (2) that the defendant was previously convicted of felonies involving the use or threat of violence to the person. These felony convictions were listed in the presentence investigation report, and included two convictions discussed in a confidential section of the report which the appellant was not given the opportunity to explain or deny.

On appeal, we affirmed appellant's conviction, but remanded for resentencing to comply with the dictates of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), which was decided after the trial of this case.

Following our remand, the trial judge ordered a new presentence investigation report and conducted a hearing to provide appellant the opportunity to respond to the report. Following this sentencing hearing, the trial judge reimposed the death sentence, once again finding two aggravating and no mitigating circumstances. Appellant raises five asserted errors in the resentencing proceedings.

Appellant first contends that at the resentencing hearing the trial judge improperly allowed the state to introduce new evidence in support of an aggravating circumstance. In the original sentencing phase, the trial judge rejected the state's proffer of evidence to the jury which established the appellant's conviction of forcible carnal knowledge and aggravated battery because the conviction was then on appeal. This information was also contained in the original presentence investigation report. Upon remand, because this conviction was affirmed on appeal, the trial judge did consider it as an aggravating circumstance in the resentencing proceedings. Appellant contends that the consideration of this conviction improperly expanded the scope of the remand in violation of *Songer v. State*, 365 So.2d 696 (Fla.1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), and *Dougan v. State*, 398 So.2d 439 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 367, 70 L.Ed.2d 193 (1981), and in effect allowed the state to reopen its case to prove additional aggravating factors in the sentencing phase in violation of the double jeopardy rule set out in *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). We reject this contention.

[1, 2] Neither *Songer* nor *Dougan* is applicable here. In each case this Court rejected appellant's attempt to expand the *Gardner* remand proceedings beyond the limited purpose of explaining or denying the contents of the presentence investigation report by either calling character witnesses whose testimony was not relevant to the report or by attempting to create a full-blown sentencing proceeding. The conviction considered by the court in the resentencing proceedings was in fact contained in the original presentence investigation report and the trial judge could have properly considered this conviction during the origi-

nal sentencing phase. In *Peek v. State*, 395 So.2d 492 (Fla.1980), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), we held that a trial judge could take into account convictions which were on appeal at the time of sentencing. Not only could the trial judge have considered the appellant's conviction in the original proceeding, but the information of the conviction as an aggravating circumstance was previously before the court. This circumstance does not expand the scope of the remand by allowing the state to introduce new evidence. The evidence clearly had been submitted in the initial proceedings. We hold that the trial judge may properly apply the law and is not bound in the remand proceedings by a prior legal error. [We note *Peek* was decided subsequent to the first trial.] There was no *Bullington* double jeopardy violation and appellant was given a full opportunity to explain or deny the conviction in the resentencing process.

[3] Appellant secondly contends that the trial court erred in considering the appellant's previous convictions for felonies involving violence, when such convictions were not presented to the jury for consideration in the original sentencing proceedings. According to the appellant, the trial judge's actions were violative of section 921.141, Florida Statutes (1973), Florida's death penalty provision, and the eighth and fourteenth amendments of the United States Constitution. The appellant's contention is without merit. In *White v. State*, 403 So.2d 331, 339 (Fla.1981), we upheld a sentence of death imposed by the trial judge in the face of the jury's recommendation of life where the trial judge "noted that as a result of the presentence investigation and information presented at sentencing he was made aware of a number of factors which the jury did not have an opportunity to consider." Because the aggravating circumstances outweighed any possible mitigating circumstances, the trial judge concluded that the death sentence was appropriate and we affirmed. We reach the same conclusion in this case.

[4] Third, appellant contends that the trial court erred in overriding the jury's recommendation of life because the aggravating circumstances considered by the trial judge were improper. We have already discussed and approved the aggravating circumstance of a prior conviction of a violent felony. We also conclude that the other aggravating circumstance, that the murder was heinous, atrocious, and cruel, was properly determined by the trial judge to be applicable to this case. One of the individuals who accompanied the appellant to the dump site to view the two corpses testified that the bodies were covered with "quite a bit" of blood and he could see cuts on the breasts, stomach, and chest. The witness further testified that appellant told him of how he tortured the victim with his knife while she was still living. This testimony of appellant's treatment of his victim clearly places his acts within the category of "conscienceless or pitiless crime which is unnecessarily tortuous to the victim" so as to set this "crime apart from the norm of capital felonies." *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). We find the facts suggesting that the death sentence be imposed over the jury's recommendation of life, including the prior conviction of a violent felony which the jury did not have an opportunity to consider, meets the clear and convincing test to allow override of the jury's recommendation in accordance with previous decisions of this Court. *Tedder v. State*, 322 So.2d 908 (Fla.1975).

[5] Fourth, the appellant contends that the imposition of the death sentence following a jury recommendation of life imprisonment violates the double jeopardy protections of the fifth amendment of the United States Constitution and conflicts with *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). *Bullington* is not applicable to this case. The Florida death penalty procedure is not based on a controlling jury recommendation concerning sentencing, as was the Missouri procedure in *Bullington*. More important, however, this is not a case in which the appellant has been granted a new trial and has

been resentenced by a new jury. This Court has already decided the double jeopardy issue raised by appellant. In *Douglas v. State*, 373 So.2d 895 (Fla.1979), it was argued that "a jury's life recommendation is tantamount to a judgment of acquittal of a crime for which a death sentence is appropriate, because it reflects either an absence of proven aggravating circumstances or an absence of proof that the aggravating circumstances outweigh any mitigating circumstances." *Id.* at 896. We rejected this argument in *Douglas* for two reasons. First, the jury's function under the Florida death penalty statute is advisory only. *See Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Second, allowing the jury's recommendation to be binding would violate *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[6] Fifth, the appellant contends that he was denied due process because the resentencing proceedings were not assigned to a new judge. The trial judge denied appellant's motion for substitution of judge in the resentencing proceedings. Appellant contends that a sentencing judge who has heard and relied upon improper evidence in imposing a death sentence cannot without difficulty consider proper factors on resentencing without also considering the improper evidence. To adopt this assertion would mean that whenever a defendant must be resentenced in any proceeding, a new judge must be assigned. We note that appellant offers no evidence of bias or prejudice on the part of the sentencing judge other than the fact that he was the trial judge in this case. In *Douglas v. Wainwright*, 521 F.Supp. 790 (M.D.Fla.1981), the court rejected a similar argument, finding that the sentencing judge's statements showed that improper convictions were not used against the defendant in sentencing. The court in *Douglas* followed *United States v. Gaither*, 503 F.2d 452 (5th Cir. 1974), *cert. denied*, 420 U.S. 961, 95 S.Ct. 1349, 43 L.Ed.2d 437 (1975), which held that it is not inherently impossible for a court to disclaim consideration of an improper conviction in sentencing while still having knowledge of the conviction. We conclude that the evidence in the instant case clearly indicates that the sentencing judge properly disregarded the information in the original presentence investigation report in resentencing appellant.

For the reasons expressed, we affirm the imposition of the death sentence.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON and EHRLICH, JJ., concur.

McDONALD, J., dissents with an opinion.

McDONALD, Judge, dissenting.

I dissent on the sentence of death primarily because the jury recommended life. I see no compelling reason to override that recommendation. The jury viewed this defendant and listened to the details of this homicide. They could conclude that a life sentence is appropriate. After all, Spaziano was known as "Crazy Joe." When he was 20 years old he was involved in a serious accident. Ever since then he has not been "normal." The jury could well find that he was entitled to the statutory mental mitigating factors. The bizarre and gross nature of this homicide is supportive of that finding. Certainly on factual disputes the trial judge, and we on review, should yield any contrary beliefs to that of the jury. I would remand with instructions to impose a life sentence without eligibility for parole for twenty-five years.

APPENDIX B

JOSEPH ROBERT SPAZIANO, **

Appellant, ** CASE NO. 50,250

vs. ** Circuit Court Case No. 75-430-CFA (Seminole)

STATE OF FLORIDA, **

Appellee. **

On consideration of the motion for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and EHRLICH, JJ., Concur
McDONALD, J., Dissents

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Deputy Clerk

cc: Hon. Arthur H. Beckwith, Jr., Clerk
Hon. Robert B. McGregor, Judge

Craig S. Barnard, Esquire
Richard W. Prospect, Esquire

APPENDIX C

CHAPTER 921

SENTENCE

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237, ch. 19454, 1939; CGL 1940 Supp. 8663(246); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 74-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174.

Note.—Former s. 919.23.

APPENDIX D

JUDGE/JURY ROLES IN CAPITAL PENALTY DETERMINATION

A Survey of National Legislative Practice
1972-1981

1. Jury Life Verdict Binding

ARKANSAS	Crim. Code (1977) §41-1301 & §41-1302	L
CALIFORNIA	Penal Code (1979) §190.3-190.4	U
COLORADO	Rev. Stats. (1979 Cum.Supp.) §16-11-103	L
CONNECTICUT	Gen. Stats. Ann. (1979 Pck.Pt.) §53a-46a	U
DELAWARE	Code Ann. (1977 Cum.Supp.) §11-4209	L
GEORGIA	Code Ann. (1977) §26-3102, §27-2302	L
ILLINOIS	Ann. Stats. (1979) §38-9-1	L
KENTUCKY	Rev. Stats. (1978 Cum.Supp.) S532.025 #	U (?)
LOUISIANA	Code of Crim. Proc. (Pck.Pt. 1979) Art. 905.8	L
MARYLAND	Ann. Code (1978 Cum.Supp.) Art. 27, §413	L
MASSACHUSETTS	1979 Chapter 488, §55	L
MISSISSIPPI	Code (1978 Cum. Supp.) §99-19-101	L
MISSOURI	Crim. Code (1979 Spec. Pamph.)	L

MISSOURI (con't)	§565.006	
NEVADA	Rev. Stats. (1977) §175.554	U
NEW HAMPSHIRE	Rev. Stats. Ann. (1977 Supp.) §630.5	L
NEW MEXICO	Stats. Ann. (1979 Supp.) 31-20A-3	L
NORTH CAROLINA	Gen. Stats. (1978) §15A-2000	L
OHIO	Rev. Code (1981 Legislation, File 60) §2929.024(D)(2)	L
OKLAHOMA	Stats. Ann. (1978-1979 Pck.Pt.) §21-701.11	L
PENNSYLVANIA	Act No. 1978-141: §18-1311	L
SOUTH CAROLINA	Code. Ann. (1978 Cum.Supp.) §16-3-20	L
SOUTH DAKOTA	State Laws 1979 Chapter 160: S23A-27A-4	L (?)
TENNESSEE	Code Ann. (1978 Cum.Supp.) §39-2404	L
TEXAS	Code Crim.Proc.Ann. 37.071	T
UTAH	Crim. Code (1978) §76-3-207	L
VIRGINIA	Code (1979 Cum. Supp.) §19.2-264.4	L

WASHINGTON	Rev. Code Ann. (1978 Pck.Pt) §10.94.020	U (?)
WYOMING	Stats. (1977) §6-4-102	L
UNITED STATES	49 USC §1473 (1976) (Antihijacking Act)	U

2. Jury Life Verdict Not Binding

ALABAMA	Senate Bill 241, §§8-9 (1981)	A
FLORIDA	Stats. Ann. (1977) §921.141	M
INDIANA	Stats. Ann. (1979) §35-50-2-9	U

3. Penalty Determination by Judge(s) Alone

ARIZONA	Rev. Stats. Ann. (1978 Supp. Pamph) §13-454	
IDAHO	Code (1978 Cum. Pck.Supp.) §19-2515	
MONTANA	Rev. Codes (1977 Unterim Supp.) §95-2206.6	
NEBRASKA	Rev. Stats.(1975) §29-2520	
OREGON	Rev. Stats. (1979) §163.116 *	

LEGENDS AND NOTATIONS

L---Life sentence unless jury unanimously agrees on death
U---Unanimous verdict required for

either life or death
M---Simple majority suffices for verdict of either life or death
A---Alabama system: 10 jurors required for death, 7 jurors required for life

T---Unique Texas procedure: penalty jury answers special questions on deliberate nature of murder, probability defendant would engage in future acts of dangerous violence, and (if raised) lack of provocation by victim. 12 jurors required to answer "yes" to each question for imposition of a death sentence; 10 jurors suffice to answer any question "no" and prevent death sentence.

The Kentucky statute is not absolutely clear in its language concerning the finality of a jury decision against death, but in Gall v. Commonwealth, 607 S.W.2d 97, 104 (Ky. 1980) the Supreme Court of Kentucky construed the statute to require a jury finding of at least one aggravating circumstance in the penalty phase before the judge may consider imposing the death penalty. Since the statute calls for written findings of aggravating circumstances by the jury only "if its verdict be a recommendation of death," see Kentucky Rev. Stats. (1978 Cum.Supp.) §532.025 (3), it appears that a jury life decision is in effect binding under the Kentucky scheme.

* Oregon death penalty statute declared unconstitutional by the Supreme Court of Oregon in State v. Quinn, 623 P.2d 630 (or. 1981) on ground that "deliberateness" of capital murder a fact to be determined by the trial judge alone in the penalty phase denied an accused the right to trial by jury.

(?) The Kentucky statute as interpreted by the Supreme Court of Kentucky requires a unanimous jury verdict for death, but the consequences of a jury's failure to agree on the penalty issue are not defined. The Connecticut and South Dakota statutes do not specifically state a unanimity requirement on penalty, but it is fairly assumed; the Washington statute does not specify the result if the jury fails to agree on the penalty issue.

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OVERALL CATEGORIES

JURY LIFE VERDICT BINDING	29
JURY LIFE VERDICT NOT BINDING	3
PENALTY DETERMINED BY JUDGE(S) ALONE	5
TOTAL JURISDICTIONS	37

PRACTICES WHERE JURIES PARTICIPATE IN DETERMINING PENALTY

JURY RESULT FOR LIFE IMPRISONMENT BINDING	29
JURY RESULT FOR LIFE IMPRISONMENT NOT BINDING	3
SUBTOTAL OF JURISDICTIONS WITH JURY PARTICIPATION	32

****

RULES ON JURY PENALTY VOTE

LIFE IMPRISONMENT UNLESS JURY UNANIMOUS FOR DEATH (L)	22
UNANIMITY REQUIRED FOR EITHER LIFE OR DEATH (U)	7*
10 JURORS REQUIRED FOR DEATH, 7 FOR LIFE (A)	1*
SIMPLE MAJORITY SUFFICES FOR LIFE OR DEATH (M)	1*
TEXAS PROCEDURE--SPECIAL PENALTY QUESTIONS (T)	1
SUBTOTAL OF JURISDICTIONS WITH JURY PARTICIPATION	32

*(U) includes Indiana (life decision not binding); (A) includes only Alabama (life not binding); (M) includes only Florida (life not binding). However, the majority rule in Florida is not connected with the nonbinding nature of a life decision under the 1972 statute, since during the period 1872-1972 the same majority rule prevailed but the jury's life decision was final under state law.

****

METHOD OF STUDY: This survey includes the latest discretionary death penalty statute passed in each jurisdiction since Furman v. Georgia, 408 U.S. 238 (1972).

THIS SURVEY BASED ON BEGISLATIVE INFORMATION AVAILABLE TO DECEMBER 22, 1981

APPENDIX E

UTAH EXECUTIONS AND DEATH SENTENCES
JURY RECOMMENDATIONS

Previous to the decision of Furman v. Georgia, 408 U.S. 238 (1972), the State of Utah had a death penalty statute which made the ultimate penalty mandatory unless the jury recommended mercy, and in cases where the jury did recommend mercy extended discretion to the trial judge to impose a penalty of death or of life imprisonment. It may be noted that under Utah law death was the normal penalty for first degree murder, and life imprisonment the exception which thus required agreement by both judge and jury.

There follows a list of every defendant whose death sentence was executed in Utah between 1948 and 1967 (when a moratorium on executions began which was to last nationwide for 10 years

while federal constitutional questions were being resolved).

Also, there are listed reports of two Utah cases (in 1941 and 1951) where a death sentence was sustained by the Utah Supreme Court after a jury recommendation of mercy, but was not carried out.

The records show that at least since 1948, there were no executions in Utah after jury recommendations of mercy.

DEFENDANTS EXECUTED IN UTAH
1948-1967

Name - Date of Verdict	Dist.Ct.# and Appellate Report
1. Mares, Elisio J. Executed - 9/10/51 Verdict - March 7, 1947	Summit Cnty. 3rd Dist.Ct. #420 State v. Mares, 192 P.2d 861 (Ut. 1948)

Name - Date of Verdict	Dist.Ct.# and Appellate Report
2. Gardner, Ray Dempsey - Executed - 9/29/51 Verdict - Dec. 13, 1949	Weber Cnty. 2nd Dist.Ct. #4803 State v. Gardner, 230 P.2d 559 (Ut. 1951)
3. Neal, Don Jesse Executed - 7/1/55 Verdict - (see note)	(see note) State v. Neal, 262 P.2d 756, 759 (Ut. 1953) Utah S. Ct. noted lack of jury mercy recommendation id. at 759.
4. Braasch, Vern A. Executed - 5/11/56 Verdict - Dec. 9, 1949	Iron Cnty. 5th Dist.Ct. #171 State v. Braasch, 229 P.2d 289 (Ut. 1951)
5. Sullivan, Melvin L. Executed - 5/11/56 Verdict - Dec. 9, 1949	Same as Braasch (co-defendant) Sub nomine Braasch
6. Kirkham, Barton K. Executed - 6/7/58 Verdict - (see note)	(see note) State v. Kirkham, 319 P.2d 859, 862 (Ut. 1958). Absence of jury mercy recommendation

6. Kirkham (con't)		noted in opinion, id. at 862.
7. Rodgers, James W. Executed - 3/30/60 Verdict - Dec. 14, 1957		San Juan Cnty. 7th Dist. Ct. Crim. #243 State v. Rodgers, 329 P.2d 1075 (Ut. 1958)

NOTE: In two cases, those of Neal and Kirkham, the opinion of the Utah Supreme Court itself mentions the choice of the jury for a verdict of first degree murder without rather than with a recommendation of mercy; thus only the appellate citation is given for these cases. Information on the other five cases was obtained from the relevant Judicial District Courts of Utah, where the defendants were tried. In each of these cases, trial records revealed a jury verdict of first degree murder without recommendation for mercy. This is especially striking because customarily Utah juries were provided with separate verdict forms for each possible decision, including guilty of first degree murder with a recommendation for life imprisonment.

DEFENDANTS WITH DEATH SENTENCES AFFIRMED IN UTAH AFTER LIFE RECOMMENDATIONS WHO WERE NEVERTHELESS NOT EXECUTED (THIS LIST IS NOT NECESSARILY EXHAUSTIVE, ALTHOUGH THERE IS NO SPECIFIC INDICATION THAT OTHER CASES EXIST).

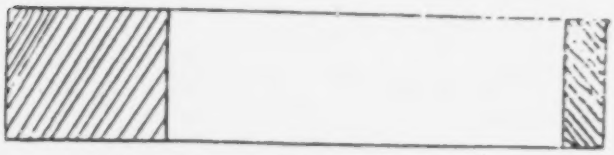
Name	Appellate Opinion Aff'g Sentence & Date Commuted
1. Markham, John	State v. Markham, 112 P.2d 496, see 496-497 (Ut. 1941). June, 1941
2. Matteri, Fred	State v. Matteri, 225 P.2d 325, see 329-330 (Ut. 1950). June 11, 1951

NOTE: Commutation dates based on records of Utah State Prison, which also confirm that the list of executions taken above from Bowers, Executions in America 385 (1974) is in fact accurate and complete. The records merely say "commuted," giving no details. However, the Utah State Archives are now researching for the existence of any public clemency documents in these cases.

APPENDIX F

JUDGE/JURY CAPITAL PENALTY DISAGREEMENT
IN 21 FLORIDA COUNTIES
1972-1978

When Judge and/or Jury Find(s) For Death Penalty in percentages



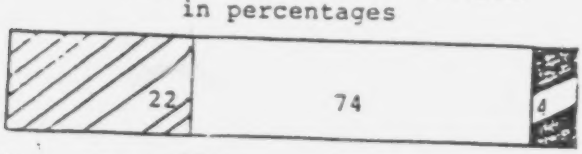
28	66	6
Jury: life	death	death
Judge: death	death	life

NOTE: This chart is based on a survey of all 79 cases in 21 of the 67 Florida counties during the period 1972-1978 where the penalty jury and/or the trial judge reached a verdict or sentence of death. The data is reported in L. Foley, Florida After the Furman Decision: Discrimination in the Imposition of the Death Penalty (unpublished paper at the University of North Florida), and is summarized in S.Gillers, Deciding Who Dies, 129 U. of Penn. L. Rev. 1, 67-68 n. 318 (1980).

This data does not include cases where the accused waived a penalty jury.

Table 10

Judge-Jury Disagreement on Issue of Guilt
When either or both convict
in percentages

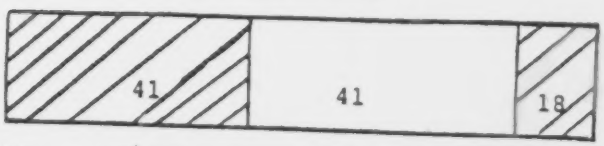


Jury:	not guilty	guilty	guilty
Judge:	guilty	guilty	not guilty
	Judge and Jury Disagree		

Source: H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment 36 (1968). Table based on survey of trial judge's hypothetical verdict if (s)he had tried case alone (where jury was actual trier of guilt or innocence). Data based on both capital and noncapital cases studied in H. Kalven, Jr. and H. Zeisel, The American Jury (1966).

Table 11

Judge-Jury Disagreement on the Death Penalty
When either or both impose it
in percentages



Jury:	prison	death	death
Judge:	death	death	prison

Judge and Jury Disagree

Source: H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment 37 (1968). Table based on survey of trial judge's hypothetical verdict on penalty if (s)he had tried case alone, in capital cases where jury was trier of fact and had discretion to choose between death and imprisonment.

82-3276

No. ___

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JOSEPH ROBERT SPAZIANO
Petitioner,
vs.

STATE OF FLORIDA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, JOSEPH ROBERT SPAZIANO, who is now imprisoned in the custody of the Florida Department of Corrections, asks leave to file the accompanying Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has proceeded in forma pauperis at all times in the state courts below. Petitioner has attached hereto his affidavit in substantialy the form prescribed by Fed. Rules App. Proc., Form 4, and the Rules of this Court.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY _____
CRAIG S. BARNARD
Chief Assistant Public Defender

NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

==========

JOSEPH ROBERT SPAZIANO,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

==========

AFFIDAVIT

I, JOSEPH ROBERT SPAZIANO, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees;

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was convicted and sentenced to death by the Circuit Court of Seminole County, Florida. The Supreme Court of Florida upheld the conviction and death sentence. I am now petitioning for a writ of certiorari to the Supreme Court of the United States.

Joseph Spaziano
JOSEPH ROBERT SPAZIANO

Duly witnessed and sworn to before me
this 4 day of ~~September~~ October, 1983.

Victory Z. Mayo
NOTARY PUBLIC

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEPTEMBER 25, 1984